No. 10-820

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARISSA SCHAIN, ET AL.,

Petitioners,

v.

BENNO C. SCHMIDT, IN HIS CAPACITY AS CHAIRMAN OF THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

MARTIN S. KAUFMAN
Counsel of Record
Atlantic Legal Foundation
2039 Palmer Avenue
Larchmont, New York 10538
(914) 834-3322
mskaufman@atlanticlegal.org
Counsel for Amici Curiae

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QUESTION PRESENTED

Whether the Second Circuit erred in approving CUNY's notice and procedures for refund of referendum-based NYPIRG fees without requiring CUNY to include any of the safeguards mandated in the analogous labor union agency fee case law, in particular *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), which requires a the fee-collector to minimize the burden on objection, provide adequate notice, and establish an interest-bearing escrow or advanced rebate to avoid imposing an involuntary interest-free loan on dissenting students.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, *amicus* states that it is a Pennsylvania not-for-profit corporation. It does not have shareholders, and is not the parent or subsidiary of any other corporation that is publicly held.

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INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm that provides legal counsel, without fee, to scientists, educators, and other individuals and trade associations. The Atlantic Legal Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating for limited and efficient government, free enterprise, individual liberty, school choice, and sound science. *Amicus curiae's* leadership includes distinguished legal scholars and practitioners from across the legal community. Of particular significance here, the Atlantic Legal Foundation has served as counsel for student plaintiffs in a number of cases involving constitutional implications of "compelled speech" through mandatory fees, including *Carroll v.*

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Copies of those consents have been lodged with the Clerk. *Amicus* has given notice of intent to file this brief to all parties more than 10 days before this brief was filed.

Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Blinken, 957 F.2d 991 (2d Cir. 1992); *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985); and *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982).

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Public universities may impose student activity fees when their method of allocation is "viewpoint neutral" and if the method of allocation is not viewpoint neutral, may, but need not, substitute an "optional or refund system" for viewpoint neutrality. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 231-232, 235 (2000).

City University of New York ("CUNY") colleges[2] fund NYPIRG, the New York counterpart by a special referendum, whose sole question is whether a specific fee – $5.00 per semester (Pet.App. 156a-157a, 163a, 169a, 89a-92a) – should be added to the students' tuition and fees bill each semester to support the New York Public Interest Research Group ("NYPIRG"), acknowledged to be a political advocacy organization. The fee is mandatory – students must pay student activity

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[2] The individual defendants are member of the Board of Trustees of CUNY.

fees as a condition to register for classes and to obtain transcripts. Pet.App. 188a. The CUNY Board of Trustees has "earmarked" the "NYPIRG fee" to NYPIRG itself (*see* Pet.App. 90a). Because referendum-based funding of such ideological groups is not viewpoint neutral, *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. at 235, CUNY colleges have established a "refund system" for the "NYPIRG fee" as an "alternative protection."

The plaintiff students in this case challenged the fee, complaining, *inter alia*, that the refund mechanism utilized by CUNY does not adequately protect their constitutional First Amendment right not to be compelled to support political speech with which they disagree and that CUNY's refund system results in a "gift" to NYPIRG.

I.

THE COURT SHOULD GRANT THE PETITION TO CORRECT THE LOWER COURTS' INCORRECT READING OF *SOUTHWORTH* AND TO PROTECT THE FIRST AMENDMENT RIGHTS OF DISSENTING STUDENTS

A. CUNY's Refund System Provides Inadequate Notice.

The district court and the Second Circuit misconstrued *Southworth* in approving this refund system without requiring the CUNY colleges to include any of the First Amendment safeguards modeled on the labor union and bar association dues line of cases, particularly *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

The lower courts reasoned that *Southworth*'s rejection of *Abood-Keller*'s "germaneness" requirement in the student activity fee context foreclosed imposition of a requirement for effective notice to students of their right to a refund, adequate notice of how to obtain a refund, and an efficient refund system.

While *Southworth* expressed concern that the *Abood-Keller* remedies for university-based student groups -- *i.e.*, pro rata refunds for non-germane speech – could be so "disruptive and

expensive that the program to support extracurricular speech would be ineffective," 529 U.S. at 231-32, *Southworth* did not address the issue whether the a university's refund system, the purported substitute for viewpoint neutrality, provides adequate alternative safeguards. *Southworth* thus does not preclude the application of *Abood-Keller* standards to the "type of optional or refund system" the university implements." *Id.*

The Second Circuit's misinterpretation of *Southworth* has broad and severe consequences for tens of thousands of CUNY students who are compelled to fund NYPIRG based on the results of referenda, provided that the component college makes a refund nominally, but not effectively, available.

At Brooklyn College, the specific unit of CUNY involved in this case, constructive "notice" that the NYPIRG fee[3] is refundable is dispersed on three non-sequential and widely separated pages in a 406-page "Academic Bulletin." Dissenting students are required, each semester, to appear in the offices of NYPIRG or at the college's Central

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[3] In fact, students' tuition and fees bills list the overall student activity fee, but not the portion allocated to NYPIRG. Of special note, the bill does not indicate that there is a separate NYPIRG fee, how much it is, nor that it is refundable. Pet.App. 197a-199a.

Depository during an unspecified two-week period to complete and submit a NYPIRG refund request form.[4] Several weeks later, NYPIRG mails a refund check, without interest (Pet.App. 63a), to the student's home.[5]

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[4] The "notice" that the NYPIRG fee is refundable is contained in the college's academic bulletin. Pet.App. 69a-83a. The existence and amount of the "NYPIRG fee" is listed on page 29 in a section entitled "Tuition and Fees." Pet.App. 69a-74a. On page 32, in a subsection entitled "Refund Policy" (which addresses refunds of tuition in cases of student withdrawal), the bulletin states: "Refund of the NYPIRG fee may be obtained during a two-week refund period set by the organization." Pet.App. 78a. On page 61, an unrelated section of the bulletin containing a quarter-page description of NYPIRG indicates that the NYPIRG fee is refundable at the offices of the NYPIRG chapter or the college's Central Depository during a "two-week period." Pet.App. 82a. Students must complete a NYPIRG refund request form providing their personal information, including home address. Pet.App. 134a, 137a, 230a. Neither CUNY nor Brooklyn College have set a time for NYPIRG to respond to refund requests. The courts below presumed that several weeks or more pass before NYPIRG mails a check to the student in the amount of the original fee, without interest. Pet.App. 21a-22a, 138a.

[5] The system is so arcane and inefficient that only *one or two* students each year avails herself of this refund

(continued...)

This Court should grant the petition because the courts below effectively strips dissenting students of protection of their First Amendment speech rights by sanctioning an obscure and onerous refund system. If the decision below is allowed to stand, CUNY students will have no effective remedy against forced funding of the viewpoint discriminatory NYPIRG fee. The precedent established by the decisions below may also jeopardize the First Amendment rights of students at the State University of New York and at public universities in other States where PIRGs have numerous campus chapters and collect millions of dollars in student fees.[6]

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[5](...continued)
system. *See* Pet.App. 135a.

[6] CUNY serves over 231,000 degree-credit students and 230,000 adult, continuing, and professional education students, Pet.App. 151a-152a, so the number of students affected and the amount of money involved is not "*de minimis*" as the district court seemed to believe. *See* Pet. App. 21a-22a. ("So we're talking about an alleged involuntary loan of $5 for 3 or 4 months [at a time] which by my calculation is at 2 percent [interest] . . . Did you ever hear the maxim[] [*de*] *minimis non curat lex*?"). The District Court characterized the dispute in this regard was a "trifle" over "as much as a nickel" or "50 cents." Pet.App. 64a-65a

In *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000), this Court held that "objecting students may insist upon certain safeguards with respect to the expressive activities which they are required to support." *Id.* at 229, and "The principal standard of protection . . . is the requirement of viewpoint neutrality."*Id* at 233. The Court noted that the student referendum mechanism of the University of Wisconsin's program "appears to permit the exaction of fees in violation of the viewpoint neutrality principle." *Id.* at 220.

CUNY has adopted a "refund system" for the referendum-based NYPIRG fee as an alternative to viewpoint neutrality. Having done so, Petitioners argue that *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), and their progeny establish the appropriate standard for evaluating the constitutional adequacy of CUNY's notice and refund procedures; and that the most pertinent case *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

The District Court held that "the union cases simply do not apply under *Southworth*" even when the University itself opted for a refund system. *See* Pet.App. 63a. The District Court framed the constitutional standard for evaluating CUNY's refund procedure as whether it was "sufficiently burdensome in some way as to take it out of *Southworth*." Pet.App. 62a, and held that the

University's refund system for the NYPIRG fee was "entirely unobjectionable." *Id.*

Amicus believes the courts below erred in their interpretation of *Southworth* and in ignoring the standards developed by this Court in other cases treating compelled financing of political speech. The District Court interpreted *Southworth* as limiting the protection of students' First Amendment rights to "viewpoint neutrality" and declined to impose an effective "optional or refund system."

Southworth, contrary to the lower courts' understanding, stands for the proposition that when the method of allocating student fees to an ideological organization is not viewpoint neutral, as when it is imposed by a referendum, a public university must adopt an alternative system that adequately protects the First Amendment rights of dissenters, such as an "optional[7] or refund system." *Southworth* at 232. A refund system must effective and not ephemeral, obscure or overly complicated, for, as this Court has held, "First Amendment rights are fragile and can be destroyed by insensitive procedures," *Hudson*, 475 U.S. at 303 & n.12 (internal citations and quotation marks omitted). An incomplete or recondite notice,

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[7] A system which allows the dissenting student to elect not to pay that portion of the student fee "up front."

combined with cumbersome procedures, does not pass constitutional muster.

Amicus agrees with Petitioners that CUNY's system consists of uninformative or inaccessible notice and its refund procedures are unnecessarily cramped and cumbersome.

The reasoning of the courts below, that *Southworth*'s rejection of the "germaneness" requirement to the student activity fee makes the holdings in the union and bar association dues cases irrelevant is inconsistent with *Southworth*. In *Southworth* the Court expressed concern that deciding what activities are "non-germane" to a university's mission as a step in calculating the refunds for non-germane speech (the *Abood-Keller* remedy for union or bar member dissenters) might be so "disruptive and expensive that the program to support extracurricular speech would be ineffective," and inapplicable given the unique status of educational institutions. 529 U.S. at 231-32. However, the issue in this case is not whether NYPIRG's activities are "germane" to the educational mission of CUNY, because the NYPIRG fee is already segregated by the university. CUNY has prescribed the refund as its way of providing a system that is purportedly equally protective of dissenters' rights as would be a viewpoint neutral allocation of funds to student activities. The issue in this case is whether the university's refund system does provide adequate

safeguards. *Southworth* does not foreclose an examination of the effectiveness of the CUNY-NYPIRG refund system, as the lower courts held; rather it mandates it. This Court's precedent in the *Abood-Keller* line of cases prescribing the requirements of a refund system -- not the "germaneness" criterion -- are therefore relevant when the a public university imposes a referendum-based fee and a refund system to "satisfy" First Amendment requirements.

Hudson establishes three basic requirements: (1) the refund procedure must be "carefully tailored to minimize the infringement" on dissenting employees' exercise of their First Amendment rights to object, 475 U.S. at 303; (2) the individual notice provided must contain adequate information, *id.* at 306; (3) the refund system may not use a "pure rebate approach," *i.e.* "a forced exaction followed by a rebate equal to the amount improperly expended," *id.* at 303-06, lest "the [student organization] obtains an involuntary loan" for expressive activities to which the student objects and poses "the risk that dissenters' funds may be used [even] temporarily for an improper purpose." *Id.* at 304, 305. There is, we submit, no principled reason these criteria cannot and should not apply to refunds of non-viewpoint neutral university fees. They certainly do not impose an undue burden on the university or on NYPIRG.

While the notice and procedures for dissenting students need not be identical to those for "agency fee" employees or members of the bar, the procedures must satisfy the constitutional minimum standards appropriate in the university context. This is a two-way street, for just as universities need not justify the "germaneness" of a funded student group's activities, a dissenting student should not be charged with the attention to detail and the same ability to parse the university's publications to piece together instructions for obtaining a refund as might be expected of an attorney who seeks a refund of bar dues.[8]

B. CUNY's No Interest Refund Violates Students' Rights.

The refund NYPIRG makes to students months after the students are required to pay tuition and fees at registration each semester is only the fee actually paid, without interest. It is "a forced exaction followed by a rebate equal to the amount improperly expended," and the very sort of "pure

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[8] As noted, the Brooklyn College Academic Bulletin spreads relevant information about refund of the NYPIRG fee on three pages in a 406-page document without cross-references. No single page provides complete and accurate notice of the availability of a refund and the procedure to obtain one.

rebate approach," condemned by this Court in *Hudson*, 475 U.S. at 303-06, because "the [student organization] obtains an involuntary loan" for expressive activities to which the student objects and poses "the risk that dissenters' funds may be used [even] temporarily for an improper purpose." *Id.* at 304, 305. Contrary to the lower courts' inference, there is no requirement that the *Hudson* criteria apply only if the exaction is "substantial."

The apparent reliance by the district court on the fact that the interest on the refunded NYPIRG fee would be small is completely inconsistent with a proper analysis of the constitutional question. Indeed, as this Court held in *Elrod v. Burns*, 427 U.S. 347, 373 (1976) "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Moreover, even in "practical" terms, the "involuntary loan" of 50 cents by a student at a public university might be as important to her as is the amount of interest on the "non-germane" portion of dues exacted from a non-member of the union.

Amicus believes that CUNY's notice and refund procedure at Brooklyn College does not satisfy the Constitutional requirements as prescribed in this Court's compelled speech cases.

One way of providing adequate notice and an administratively simple process ,and avoiding the

interest free loan is the "negative check off" adopted by another state university with referendum-based student fee-funded PIRG chapters. Rutgers, the state university of New Jersey, adopted a negative check-off system in the wake of *Galda v. Rutgers*, 772 F.2d 1060, 1068 and n.5 (3d Cir. 1985) – Rutgers explicitly notifies students on their tuition bills of the existence and amount of the PIRG fee and includes a "negative check-off" box, which allows students to deduct the fee at the time he pays his semester tuition and fee bill, either on-line, by mail or in person. Pet.App. 217a-229a. That another neighboring public university has implemented such a system demonstrates that it is neither inconvenient nor burdensome to the educational mission of the public university.

Alternatively, payment of interest on the refunded NYPIRG portion of the student activity fee would cure the "interest-free loan" problem; but that would be only a partial cure, for it would not, in itself, provide the adequate notice and simplified process that *Hudson* requires.

CONCLUSION

The Court should grant the petition to correct a seriously erroneous interpretation of this Court's precedents and because that misinterpretation results in violations of students' First Amendment rights.

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Respectfully submitted,

MARTIN S. KAUFMAN
Counsel of Record
Atlantic Legal Foundation
2039 Palmer Avenue
Larchmont, New York 10538
(914) 834-3322
mskaufman@atlanticlegal.org
Counsel for Amici Curiae